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# First Amendment Protection for Union Appeals to Consumers

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## **FIRST AMENDMENT PROTECTION FOR UNION APPEALS TO CONSUMERS**

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**FIRST AMENDMENT PROTECTION FOR  
UNION APPEALS TO CONSUMERS**

**MICHAEL C. HARPER**

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# FIRST AMENDMENT PROTECTION FOR UNION APPEALS TO CONSUMERS

Michael C. Harper\*

INTRODUCTION.....	176
I. THE COURT IN <i>DEBARTOLO II</i> AND THE BOARD IN <i>CARPENTERS</i> RELY ON THE FIRST AMENDMENT.....	178
A. The Court's Statutory Interpretations Before <i>DeBartolo II</i> Require Resolution of the Constitutional Issue.....	178
B. The <i>DeBartolo II</i> Decision Has a Weak Statutory Rationale but a Firm First Amendment Basis.....	182
C. The Board's <i>Carpenters</i> Decision Cogently Interprets the Court's Constitutional Holding.....	185
II. THE FIRST AMENDMENT CAN PROVIDE DEFINABLE LIMITS ON THE PERMISSIBLE REGULATION OF CONSUMER APPEALS.....	190
A. The First Amendment Allows Regulation of Expression Intended to Incite Unlawful Boycotts.....	190
B. Consumer Boycotts Should Be Afforded Constitutional Protection.....	192
C. The First Amendment Does Not Protect Coercive or Confrontational Consumer Appeals.....	200
D. Misleading Consumer Appeals Should Be Regulated Only Under First Amendment-Based Defamation Law.....	202
CONCLUSION.....	205

## INTRODUCTION

In 2010, the National Labor Relations Board (NLRB or Board) finally embraced the full meaning of a 1988 Supreme Court decision protecting non-coercive union appeals to consumers.<sup>1</sup> In *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506 v. Eliason & Knuth of Arizona, Inc. (Carpenters)*, the Board held that a union's non-obstructive display to the public of a large stationary banner declaring "shame" on a nearby business and announcing a "labor dispute" in smaller lettering was not a violation of § 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA).<sup>2</sup> The display was

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1. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-77 (1988).

2. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 15 (N.L.R.B. Aug. 27, 2010). The

not prohibited even though the nearby business's involvement in the labor dispute derived from its dealing with another business whose labor policies or practices were the union's underlying concern.<sup>3</sup>

The Board in *Carpenters* relied primarily on the Supreme Court's interpretation of § 8(b)(4)(ii)(B)<sup>4</sup> in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II)*.<sup>5</sup> In *DeBartolo II*, the Court held that the NLRA did not proscribe a union's peaceful distribution of handbills to prospective customers of a shopping mall urging the customers not to shop at the mall because a department store being built at the mall was using "contractors who pay substandard wages and fringe benefits."<sup>6</sup> The Board in *Carpenters*, like the Court in *DeBartolo II*, could not and did not base its construction of § 8(b)(4)(ii)(B) solely on an analysis of the statutory language.<sup>7</sup>

Both the Court and the Board explained that their constructions were necessary to avoid the "serious" constitutional problem that would be posed by a First Amendment challenge to a prohibition of the consumer appeals in each case.<sup>8</sup> The Court in *DeBartolo II* invoked "[t]he elementary rule" of statutory construction "that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,"<sup>9</sup> before concluding that the Court's limiting construction protecting peaceful handbilling "is not foreclosed either by the language of the section or its legislative history."<sup>10</sup> The Board in *Carpenters* followed the Court's lead, stating that its construction of §

Board has applied its holding in over ten subsequent cases, in three of which the facts were sufficiently different to require further analysis. *See Sw. Reg'l Council of Carpenters v. New Star Gen. Contractors, Inc.*, 356 N.L.R.B. No. 88 (N.L.R.B. Feb. 3, 2011); *Sheet Metal Workers Int'l Ass'n, Local 15 v. Galencare, Inc.*, 356 N.L.R.B. Nos. 162 (N.L.R.B. May 26, 2011); *Local Union No. 1827, United Bhd. of Carpenters & Joiners of Am. v. United Parcel Serv., Inc.*, 357 N.L.R.B. No. 44 (N.L.R.B. Aug. 11, 2011).

3. 355 N.L.R.B. No. 159, slip op. at 17 ("Here, the Respondent does not seriously dispute that the object of its banner was to force or require the neutral employers to cease doing business with the primary employers.").

4. 29 U.S.C. § 158(b)(4)(ii)(B) (2006). This section provides, in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

*Id.*

5. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988).

6. *Id.* at 570 n.1.

7. 355 N.L.R.B. No. 159, slip op. at 3; *see also supra* note 4 and accompanying text.

8. 485 U.S. at 575; 355 N.L.R.B. No. 159, slip op. at 11.

9. 485 U.S. at 575 (internal quotations omitted).

10. *Id.* at 588.

8(b)(4)(ii)(B) "is supported, if not mandated, by the constitutional concerns that animated the Supreme Court's decision in *DeBartolo II*."<sup>11</sup>

In this essay I explain that both the Board's decision in *Carpenters* and the Court's decision in *DeBartolo II* require and deserve the First Amendment support on which they rely. Although the Board's interpretation of § 8(b)(4)(ii)(B) in *Carpenters* appropriately follows the Court's interpretation of this provision in *DeBartolo II*,<sup>12</sup> neither interpretation is persuasive without that support.<sup>13</sup> There exists, however, a compelling argument for First Amendment protection of a union's appeals to consumers to shun businesses because of their relations with employers with union-criticized labor policies.<sup>14</sup> This argument can build on a foundation for a consumer right to engage in concerted boycotts that I posited in an article published several years before the *DeBartolo II* decision.<sup>15</sup> In this essay I explore anew the implications of this right for First Amendment protection of the kinds of appeals unions have made in *DeBartolo*, *Carpenters*, and other similar recent cases.<sup>16</sup>

#### I. THE COURT IN *DEBARTOLO II* AND THE BOARD IN *CARPENTERS* RELY ON THE FIRST AMENDMENT.

##### A. The Court's Statutory Interpretations Before *DeBartolo II* Require Resolution of the Constitutional Issue.

The Court in *DeBartolo II* was presented with a difficult dilemma, created partly by amendments to the NLRA in the Landrum-Griffin Act of 1959<sup>17</sup> and partly by the Court's own decisions, including a prior decision in the *DeBartolo* case itself.<sup>18</sup> In its first decision, *DeBartolo I*, the Court considered whether the "publicity proviso" to § 8(b)(4) of the NLRA applied to the distribution of handbills at the entrances of a shopping mall urging consumers not to shop at any stores at the mall.<sup>19</sup> That proviso states that nothing contained in § 8(b)(4)

shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual

employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport goods, or not to perform any services, at the establishment of the employer engaged in such distribution.<sup>20</sup>

The Court held that the proviso did not exempt the distribution of handbills urging a general mall boycott in *DeBartolo* from the prohibitory force of § 8(b)(4).<sup>21</sup>

The Court found that the handbilling union's "primary dispute" was with the High Construction Company (High), a building contractor for a department store being constructed in the shopping mall for the Wilson Company (Wilson).<sup>22</sup> Neither the *DeBartolo* Corporation, which owned and operated the mall, nor the other eighty-four retailers who had signed leases to operate in the mall, "distributed" any of High's products or services.<sup>23</sup> Following the concession of the *DeBartolo* Corporation, the Court was willing to assume that High was a producer and Wilson a distributor within the meaning of the proviso,<sup>24</sup> but it was not willing to recognize *DeBartolo*'s or Wilson's cotenants as distributors of High's products simply because they might benefit indirectly from High's work.<sup>25</sup>

Although the *DeBartolo I* Court found that the publicity proviso did not apply to the union's handbilling, it did not determine that this interpretation of the proviso meant that the handbilling necessarily violated § 8(b)(4)(ii)(B). The Court instead remanded the case to the Board, stressing that the Board's dismissal of *DeBartolo*'s charge against the union was based totally on the Board's overly broad interpretation of the publicity proviso, and that the Board therefore had not considered whether the terms of the statute reached the distribution absent the exemption.<sup>26</sup> The *DeBartolo I* Court, however, in describing the issue that the Board would have to decide on remand—the scope

20. 29 U.S.C. § 158(b)(4) (2006).

21. 463 U.S. at 155-57.

22. *Id.* at 155-56.

23. *Id.* at 155.

24. *Id.* at 158. The Court acknowledged that it had previously held that an employer providing a distributional service, such as wholesaling, could be a producer for purposes of the proviso. *Id.* at 154 (citing *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964) (holding that proviso protects a union's distribution of handbills in front of supermarkets urging consumers not to buy candy and other products distributed by wholesaler with whom union had labor dispute)). Presumably, a company providing construction services thus also could be a producer for purposes of the proviso, and an employer using a building constructed with these services could be a distributor. For a cogent criticism of the Court's interpretation of the proviso in *Servette* and *DeBartolo I* as an exception to rather than a clarification of § 8(b)(4), see Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149, 159-166. See also *infra* note 57 and accompanying text.

25. *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. at 156-57.

26. *Id.* at 159. The Court thereby also avoided reaching what it termed "the constitutional issue in this case." *Id.*

11. 355 N.L.R.B. No. 159 at 11.

12. See *infra* notes 42-46, 74-76 and accompanying text.

13. See *infra* notes 46-57 and accompanying text.

14. See *infra* notes 75-88 and accompanying text.

15. See Michael C. Harper, *The Consumer's Emerging Right To Boycott: NAACP v. Claiborne Hardware and Its Implication for American Labor Law*, 93 YALE L.J. 409 (1984).

16. See *infra* notes 130-57 and accompanying text.

17. Labor-Management Reporting and Disclosure Procedure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (2006)).

18. See *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983).

19. *Id.* at 157-58.

of the prohibition—cited one of its prior decisions that seemed to direct the Board to find a statutory violation.<sup>27</sup>

In that prior decision, *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, the Court interpreted the language in § 8(b)(4)(ii)(B) to cover a consumer appeal like that in *DeBartolo*.<sup>28</sup> Section 8(b)(4)(ii)(B) states that it is

an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person.<sup>29</sup>

The *Safeco* Court held that this language covered an appeal to consumers that, if successful, would threaten “neutral parties with ruin or substantial loss”—that is, a “person engaged in commerce” other than an employer with whom the union has an underlying labor dispute.<sup>30</sup> Such a successful appeal, the Court explained, would put “neutral” parties “to a choice between their survival and the severance of their ties” with the employer with whom the union has the underlying labor dispute, and thus “plainly violates the statutory ban on the coercion of neutrals with the object of ‘forcing or requiring [them] to cease . . . dealing in the [primary] produc[t] . . . or to cease doing business with’ the primary employer.”<sup>31</sup> The Court thereby confirmed that the coercion with which § 8(b)(4)(ii)(B) is concerned is the coercion of “neutral” businesses that occurs when a business is forced to choose between a crippling loss of patronage and a continued relationship with another business that is involved in a labor dispute.

To be sure, the consumer appeal in *Safeco* was communicated not only through distributed handbills, but also through picket signs carried around the “neutral” title insurance companies that sold the insurance of the Safeco Title Insurance Co.<sup>32</sup> For this reason, the *Safeco* Court could relegate mention of the publicity proviso at issue in *DeBartolo I* to a footnote.<sup>33</sup> But the distinction between picketing and handbilling was of no relevance to the Court’s analysis of the meaning of coercion in the language of § 8(b)(4)(ii)(B). A “neutral” threatened by a consumer appeal “with ruin or substantial loss” if it continues to deal with another business is subject to coercion or restraint regardless of whether the appeal utilizes picketing or instead relies only on handbills and other types of non-confrontational communication.

27. *Id.* at 159 n.11 (citing *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980)).

28. *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 609 (1980).

29. 29 U.S.C. § 158(b)(4)(ii)(B) (2006).

30. 447 U.S. at 615-16.

31. *Id.* at 616 (quoting § 8(b)(4)(ii)(B)) (alterations in original).

32. *Id.* at 609-10.

33. *Id.* at 610 n.3.

The irrelevance of the distinction between picketing and handbilling to the *Safeco* Court’s interpretation of § 8(b)(4)(ii)(B) is confirmed by the Court’s distinguishing treatment of its earlier decision in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*.<sup>34</sup> In *Tree Fruits*, a union striking against fruit packers that sold Washington apples to the Safeway supermarket chain placed peaceful pickets before forty-six stores in and about Seattle. The pickets asked Safeway customers not to purchase Washington apples, but did not ask the customers not to shop generally at the stores.<sup>35</sup> As explained by the Court in *Safeco*, the *Tree Fruits* Court found legal the picketing of the Safeway stores because it “‘merely follow[ed] the struck product,’” and thus “‘did not ‘threaten, coerce, or restrain’ the secondary party within the meaning of § 8(b)(4)(ii)(B).”<sup>36</sup> For the Court in *Tree Fruits*, as for the Court in *Safeco*, the applicability of § 8(b)(4)(ii)(B) turned not on how consumers were persuaded, by picketing or by other forms of communication, but rather on whether they were persuaded to coerce another “neutral” business to sever an economic relationship with the “primary” business. The Court in *Safeco* concluded that the picketing of the title insurance companies, who sold Safeco insurance exclusively, threatened these companies with ruin and thus coerced them to assist the boycott of Safeco, while the Court in *Tree Fruits* had found that the picketing of the Safeway stores only reduced the demand for Washington apples and did not coerce Safeway to do more than adjust to this reduced demand.<sup>37</sup>

34. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964). The *DeBartolo I* Court also cited the *Tree Fruits* decision when remanding the *DeBartolo* case to the Board for consideration of the applicability of § 8(b)(4)(ii)(B). *See* 463 U.S. at 158 n.11.

35. 377 U.S. at 59-60.

36. *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 612 (1980) (alteration in original).

37. Justice Brennan, who authored the Court’s decision in *Tree Fruits*, dissented from the Court’s distinction of that case in *Safeco*. 447 U.S. at 619 (Brennan, J., dissenting). Justice Brennan stressed that the picketers in *Safeco*, like the picketers in *Tree Fruits*, asked consumers to not purchase only the product of the primary employer; the *Safeco* picketers did not ask consumers to boycott any other products that the title companies might sell. *Id.* at 620. Justice Brennan then made a persuasive case that the scope of the coverage of § 8(b)(4)(ii)(B) should turn not on the impact of a successful consumer appeal on the “neutral” employer, but rather on whether the “primary conflict [is] amplified by the impact of the boycott upon nonprimary goods” because consumers were asked to boycott more than the products of the primary. *Id.* at 621 (emphasis in original). Whether Justice Brennan’s standard for the scope of § 8(b)(4)(ii)(B) is preferable to that of the *Safeco* majority is irrelevant to the *DeBartolo* case, however, as the union’s appeal in *DeBartolo* asked prospective customers to boycott all products sold at the mall, not just those of the primary employer, High, the construction company. Indeed, Justice Brennan’s interpretation of § 8(b)(4)(ii)(B) would have covered the *DeBartolo* consumer appeal even if it had only asked consumers to boycott the Wilson department store constructed by High, as Justice Brennan allowed that a boycott of a primary product, like construction, merged with non-primary products, like the goods sold at a department store, is within the coverage of § 8(b)(4)(ii)(B). *Id.* at 622 n.2.

Given the Court's decision in *Safeco*, as well as its earlier decision in *Tree Fruits*, it was not difficult to predict how the Board would treat the *DeBartolo* case on remand. The Court in *DeBartolo I* had held that the publicity proviso to § 8(b)(4) did not cover the union's broad appeal to consumers to not patronize any stores at the DeBartolo-owned and operated mall.<sup>38</sup> The Court in *Safeco* had held that § 8(b)(4)(ii)(B) covered a union's appeal to consumers that, if successful, would coerce a "neutral" businesses to sever economic ties with a business with whom the union had a primary dispute.<sup>39</sup> Predictably, then, the Board found the union's distribution of the handbills to potential customers of stores at the DeBartolo mall to be an unfair labor practice, potentially subject to both an injunction from the Board and private rights of action by any business damaged by the consumer response.<sup>40</sup> The Board understood that the object of the handbilling was "to force the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's not to do business with High."<sup>41</sup>

*B. The DeBartolo II Decision Has a Weak Statutory Rationale but a Firm First Amendment Basis.*

When the *DeBartolo* case returned to the Supreme Court, the Court could no longer avoid the constitutional problem posed by its prior decisions and the broad language of § 8(b)(4)(ii)(B). Citing dicta in *Tree Fruits* and decisions allowing regulation of picketing to invoke worker boycotts, the Court in *Safeco* had concluded without analysis that "[a]s applied to picketing that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech."<sup>42</sup> In *DeBartolo I*, however, the union had encouraged consumers to boycott the "secondary" cotenants not by picketing, but rather by the mere distribution of handbills. The handbills attempted to persuade consumers by asserting that the "Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits."<sup>43</sup> As explained by the *DeBartolo II* Court, the handbills "truthfully revealed the existence of a labor dispute and urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall. The handbilling was peaceful. No picketing

38. *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 156-57 (1983).

39. *Retail Store Employees Union, Local 1001*, 447 U.S. at 613.

40. *Fla. Gulf Coast Bldg. Trades Council v. Edward J. DeBartolo Corp.*, 273 N.L.R.B. 1431, 1432 (1985). "Whoever shall be injured in his business or property by reason or any violation of [§ 8(b)(4)] may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit." 29 U.S.C. § 187(b) (2006).

41. 273 N.L.R.B. at 1432.

42. *Retail Store Employees Union, Local 1001*, 447 U.S. at 616.

43. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 570 n.1 (1988).

or patrolling was involved."<sup>44</sup> Since all its First Amendment precedents allowing regulation of boycotts of neutrals involved picketing,<sup>45</sup> the Court could not easily find such a peaceful distribution of literature urging legal action to advance a social or political cause to justify regulation. The Justices must have understood that an interpretation of § 8(b)(4)(ii)(B) to cover the union's consumer appeal in *DeBartolo I* "would pose a substantial issue of validity under the First Amendment."<sup>46</sup>

Instead of directly confronting this issue, however, the *DeBartolo II* Court interpreted § 8(b)(4)(ii)(B) in an unconvincing manner, inconsistently with both the plain meaning of the provision and with its prior analysis in *Safeco*. The Court did so by confusing the coercion of "neutral" or "secondary" businesses, like the DeBartolo mall's co-tenants, which is required by the language of § 8(b)(4)(ii)(B), with the coercion of potential consumers, like the potential customers of the mall, which is not.<sup>47</sup> The Court appropriately began its statutory analysis by stressing that the language of § 8(b)(4)(ii)(B) covers only actions that "'threaten, coerce, or restrain any person' to cease doing business with another."<sup>48</sup>

However, the Court then muddled the interpretation of these words by quoting the very different language in § 8(b)(4)(i)(B) that covers "inducing or encouraging employees of a secondary employer to strike" to force the secondary employer to cease doing business with another.<sup>49</sup> The Court noted that it had interpreted § 8(b)(4)(i)(B) in an earlier case not to reach "peaceful recognitional picketing" to induce a strike,<sup>50</sup> but ignored the fact that § 8(b)(4)(ii)(B) does not include language covering the inducement of consumers to boycott analogous to § 8(b)(4)(i)(B)'s language covering the inducement of

44. *Id.* at 575-76.

45. See, e.g., *Am. Radio Ass'n v. Mobile Steamship Ass'n*, 419 U.S. 215, 229-31 (1974); *Int'l Bhd. of Teamsters, Local 695 v. Vogt*, 354 U.S. 284, 291 (1957); *Int'l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 705 (1951); *Carpenters & Joiners Union of Am., Local No. 213 v. Ritter's Cafe*, 315 U.S. 722, 728 (1942).

46. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. at 576. The Court expressed the problem more fully as follows:

Had the union simply been leafleting the public generally, including those entering every shopping mall in town, pursuant to an annual educational effort against substandard pay, there is little doubt that legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment. The same may well be true in this case, although here the handbills called attention to a specific situation in the mall allegedly involving the payment of unacceptably low wages by a construction contractor.

*Id.* It is hard to understand, however, why the Court suggests that calling attention to a specific problem might deserve less protection under the First Amendment than would a general educational effort.

47. See *id.* at 578-80; see 29 U.S.C. § 158(b)(4) (2006).

48. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. at 578.

49. *Id.*

50. *Id.* (citing *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 290 (1960)).



employees to strike. Rather, the Court asserted that it need not "construe" the language of § 8(b)(4)(ii)(B) "to reach the handbills involved in this case," as "[t]here is no suggestion that the leaflets had any coercive effect on customers of the mall. There was no violence, picketing, or patrolling and only an attempt to persuade customers not to shop in the mall."<sup>51</sup>

The Court made a weak attempt to justify its twisted interpretation of the language of § 8(b)(4)(ii)(B) by highlighting its prior interpretation of the provision in *Tree Fruits* not to cover peaceful picketing to induce consumers to boycott only the product of the "primary employer."<sup>52</sup> The Court had to acknowledge that its later decision in *Safeco* had held the *Tree Fruits*' interpretation inapplicable to a case, like *DeBartolo*, where a union urged "a general boycott of a secondary employer."<sup>53</sup> Nonetheless, the Court cited its earlier willingness in *Tree Fruits* not to cover "all peaceful consumer picketing at secondary sites" as a justification for concluding "that handbilling, without picketing" need not be treated as an action that "coerces" secondary employers.<sup>54</sup> "The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers," the Court concluded, "is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do."<sup>55</sup>

The Court's conclusion, as stated in the last sentence, is both a correct factual assertion and a compelling argument for First Amendment protection of peaceful consumer appeals.<sup>56</sup> It is not, however, relevant to the meaning of the words of § 8(b)(4)(ii)(B), which require the coercion only of the "neutral" business and not of potential customers of that business. A business owner who wants to continue to deal with another business is no less coerced to cease doing so by consumer boycotters persuaded by the message conveyed in a handbill than by consumer boycotters intimidated by aggressive union picketers. The threat of coercion or restraint of the neutral business from a successful consumer appeal is exactly the same regardless of the extent to which the success of the appeal derives from the intimidation or the persuasion of the consumer boycotters.

The *DeBartolo I* Court's analysis thus cannot be justified as a reasonable interpretation of the meaning of § 8(b)(4)(ii)(B).<sup>57</sup> The distinction between

51. *Id.*

52. *Id.* at 579.

53. *Id.*

54. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. at 580.

55. *Id.*

56. See *infra* notes 75-88 and accompanying text.

57. The Court in *DeBartolo II* also did not adequately confront the implications of the Court's interpretation in *DeBartolo I* of the publicity proviso to § 8(b)(4). See *supra* note 24 and accompanying text. That interpretation suggested the proviso carried a negative pregnant by excluding the protection of appeals to consumers to boycott businesses because of relationships with other businesses, like those of the mall's co-tenants with High's construction company, which do not involve any product distribution. The Court in

picketing and handbilling directed at consumers on which this analysis rests is relevant to the Court's First Amendment precedent, but not to § 8(b)(4)(ii)(B). Thus, both the justification and the meaning of the decision must depend on the cogency of the argument for First Amendment protection of the union's consumer appeal in *DeBartolo*.

### C. The Board's Carpenters Decision Cogently Interprets the Court's Constitutional Holding.

The above analysis suggests that the Board's 2010 decision in *Carpenters* protecting appeals to consumers through peaceful stationary banner<sup>58</sup> also must find support in First Amendment analysis. If the *DeBartolo II* Court's distinction of handbilling from picketing for purposes of § 8(b)(4)(ii)(B) ultimately must rest on First Amendment considerations, then those considerations must inform whether banner<sup>59</sup>, like handbilling, should be treated as outside the scope of the "coercion" of consumers that the *DeBartolo II* Court found to be prohibited by the provision.<sup>59</sup> In fact, the Board's decision in *Carpenters* does rest firmly on First Amendment underpinnings, not only in its direct treatment of the constitutional issue posed by banner<sup>59</sup>, but also in its

*DeBartolo II* therefore had to explain why Congress would have carved out an explicit exemption from § 8(b)(4) for certain non-picketing consumer appeals if it did not intend § 8(b)(4) to cover similar consumer appeals not within the exemption. The Court's unconvincing interpretation of § 8(b)(4)(ii)(B), in other words, by excluding all non-picketing consumer appeals, made the publicity proviso totally superfluous. The Court, following the lead of the appellate court's decision in *Fla. Gulf Coast Bldg. & Constr. Trades Council v. NLRB*, 796 F.2d 1328 (11th Cir. 1986), attempted to justify this by "understanding the proviso as a clarification of the meaning of § 8(b)(4) rather than an exception to a general ban on consumer publicity." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 586 (1988). This justification, however, was effectively foreclosed by the Court's earlier narrow interpretation of the proviso in *DeBartolo I*. Given *DeBartolo I*, the Court could not explain why Congress would clarify with a proviso that was more narrow than the text it was to clarify. Instead, ignoring its own prior interpretation of the proviso, it simply asserted "[i]t is difficult . . . to fathom why Congress would consider appeals urging a boycott of a distributor of a nonunion product to be more deserving of protection than nonpicketing persuasion of customers of other neutral employers such as that involved in this case." *Id.* at 583. The Court also scanned the ambiguous legislative history of the Landrum-Griffin amendments to § 8(b)(4), Labor-Management Reporting and Disclosure Procedure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (2006)), which added both the publicity proviso and § 8(b)(4)(ii)(B) to § 8(b)(4) of the NLRA, and found no "clear indication . . . that Congress intended § 8(b)(4)(ii)(B) to proscribe peaceful handbilling" of any sort. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. at 584-87. The Court's analysis of the legislative history included a revealing quotation from the co-sponsor of the House bill, Representative Griffin, "that the bill covered boycotts carried out by picketing [the premises of] neutrals but would not interfere with the constitutional right of free speech." *Id.* at 584.

58. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159 (N.L.R.B. Aug. 27, 2010).

59. See *supra* note 51 and accompanying text.



interpretation of what makes picketing a distinct form of publicity subject to special restraints under § 8(b)(4)(ii)(B).<sup>60</sup>

The Board's decision in *Carpenters* resolved three consolidated complaints against a local union of the United Brotherhood of Carpenters and Joiners of America.<sup>61</sup> Each complaint charged the union with placing and maintaining a banner on a public sidewalk or public right-of-way outside a facility—a restaurant in one case and a medical center in the other cases.<sup>62</sup> In each case the bannered facility was owned by a business that was employing a construction company paying wages below union scale.<sup>63</sup> The construction company's contested work was at a bannered facility in one case and at other facilities owned by the targeted business in the other two cases.<sup>64</sup> In each case the banner was held facing away from the facility so that it could be read by passing motorists.<sup>65</sup> The banners were three or four feet high and from fifteen to twenty feet long.<sup>66</sup> The banners were held parallel to the sidewalk at the edge of the street so that car and foot traffic would not be blocked.<sup>67</sup> The banners were not held close to an entrance to any of the facilities.<sup>68</sup>

At the medical centers, the banners declared in large letters "SHAME ON" the medical center, and in smaller letters, "Labor Dispute." At the restaurant, operated by RA Tempe, the middle section of the banner read, "DON'T EAT RA SUSHI."<sup>69</sup> The parties stipulated that the number of union representatives present was limited to the number needed to hold the stationary banners with staggered breaks, a maximum of four, and that there was no chanting or yelling, as well as no marching.<sup>70</sup> The union representatives on break from holding the banners offered to interested members of the public flyers explaining the nature of the labor dispute.<sup>71</sup> The parties also stipulated that the representatives "did not block persons seeking to enter or exit" the facilities, and "did not engage in any other activity that is considered confrontational" beyond the holding of the banners.<sup>72</sup>

60. See *infra* notes 75-78 and accompanying text.

61. 355 N.L.R.B. No. 159, slip op. at 1 n.4.

62. *Id.* at 2.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 2.

68. *Id.* At one of the medical centers "the banner was 80 feet from an entrance to a parking lot and 510 feet from an entrance to the facility"; at the other medical center, "the banners were 1,550 and 450 feet from roads entering the facility"; and at the restaurant, "the banner was 15 feet from the door." *Id.* at 2 n.7.

69. *Id.* at 2.

70. *Id.* at 2-3.

71. *Id.* at 3.

72. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 3.

The opinion of the three-member Board majority in *Carpenters*<sup>73</sup> does not provide more persuasive support than does the Court's opinion in *DeBartolo II* for the Court's interpretation of § 8(b)(4)(ii)(B). Without any additional analysis, the Board's opinion follows the Court's reading of the "threaten, coerce, or restrain" language in § 8(b)(4)(ii)(B) to require some coercion or restraint of the consumers to whom an appeal is directed, as well as of the "secondary" businesses that are the targets of the appeal.<sup>74</sup>

In the exercise of its responsibility to apply the Court's holding in *DeBartolo II* to the facts of the bannering cases before it, however, the *Carpenters* majority opinion does persuasively explain why the bannering should be treated like the handbilling in *DeBartolo II* rather than like picketing. The Board explains that what makes picketing "qualitatively different from other nonproscribed means of expression," such as handbilling, is that picketing's impact may owe "more to intimidation than persuasion" because the patrolling of picketers in front of an entrance may create "a physical or, at least, a symbolic confrontation."<sup>75</sup> This distinction between intimidation and persuasion is central to First Amendment analysis and explains why the Court in *DeBartolo II* was impelled to treat the handbilling in that case differently than it had treated the picketing in *Safeco*.<sup>76</sup> The difference from picketing enabled the Board majority to explain the Board's prior cases by stressing the centrality of the "element of confrontation" in its treatment of conduct as "picketing for purposes of the Act's prohibitions."<sup>77</sup>

73. The three Board Members constituting the majority in *Carpenters* were Chairman Wilma Liebman and two Members, Craig Becker and Mark Gaston Pearce. *Id.* at 15. These three Board Members had union and Democratic Party affiliations and were newly appointed by President Obama. Haynes & Boone, LLP, Time for Recess: Becker, Pearce Appointed to NLRB, [http://www.haynesboone.com/becker\\_pearce\\_appointed\\_to\\_nlr/](http://www.haynesboone.com/becker_pearce_appointed_to_nlr/) (last modified Mar. 30, 2010). The two dissenters, Peter Schaumber and Brian Hayes, 355 N.L.R.B. No. 159, slip op. at 15, had management and Republican Party affiliations, see McDonald Hopkins, Employers on Notice—New NLRB Members' Bias Toward Union and Employee Interests Will Impact Both Union and Non-Union Workplaces, [http://www.mcdonaldhopkins.com/news.aspx?id=pAq\\_S1ys4UqkvlU8h1OPOQ](http://www.mcdonaldhopkins.com/news.aspx?id=pAq_S1ys4UqkvlU8h1OPOQ) (last visited Apr. 3, 2012).

74. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 4. The Board's opinion, again following the lead of the Court, also scanned the legislative history of the Landrum-Griffin amendments to the NLRA and found no indication of Congressional intent to ban more than secondary picketing. *Id.* at 5; see also *supra* note 57.

75. 355 N.L.R.B. No. 159, slip op. at 6.

76. See *supra* notes 42-46 and accompanying text.

77. 355 N.L.R.B. No. 159, slip op. at 6. The two dissenting Board Members in *Carpenters*, rather than seriously engaging the Court's controlling decision in *DeBartolo II*, glibly dismissed it in a footnote as involving handbilling rather than bannering. *Id.* at 19 n.14 (Schaumber and Hayes, Members, dissenting). The Board further distinguished *DeBartolo II* in the main text of the decision as not covering "posting an individual at a neutral's premises," even though the handbillers in *DeBartolo* were so posted. See *id.* at 22 (Schaumber and Hayes, Members, dissenting). Without any evidence in the record, and ignoring the parties' stipulation that the bannering did not obstruct the movement of any potential consumers, the dissenters concluded that the banners were somehow

The distinction, and its First Amendment underpinning, also exposed the vacuity of the arguments of the General Counsel who had pressed the consolidated cases based on his views that bannerling should be treated like picketing because it constitutes posting individuals near the entrance to a business "for the purpose of influencing"<sup>78</sup> or as a "call to action" to customers.<sup>79</sup> Obviously, handbilling is also a "call to action" and is also "for the purpose of influencing" customers. But handbilling, like the nonconfrontational bannerling involved in the consolidated cases in *Carpenters*, only seeks to influence by some form of persuasion rather than by intimidation.<sup>80</sup>

The Board majority's opinion becomes even more compelling when it turns to explaining why its protection of the non-confrontational bannerling "is supported, if not mandated, by the constitutional concerns that animated the Supreme Court's decision in *DeBartolo II* and its precursors."<sup>81</sup> The opinion cites strong judicial precedent establishing that signs and banners constitute a form of speech or expressive conduct that warrants full protection under First Amendment doctrine.<sup>82</sup> As the majority explained, this protection is not

confrontational, in part because the banners sought to invoke "convictions or emotions sympathetic to the union activity"—i.e., they attempted to persuade as would handbills. *Id.* at 19 (Schaumber and Hayes, Members, dissenting) (quoting *NLRB v. United Furniture Workers of Am.*, 337 F.2d 936, 940 (2d. Cir. 1964)). The dissenters also seemed to suggest those holding the banners somehow threatened retaliation, again without any support in the record beyond the fact that those holding banners in one of the cases were able to see who entered the targeted facility like the handbillers in *DeBartolo*. *Id.* at 20 n.27.

78. *Id.* at 7.

79. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 7 (N.L.R.B. Aug. 27, 2010).

80. The General Counsel also argued that bannerling, even if not traditional picketing, should be prohibited as a mere signal to sympathetic action. *Id.* at 9. The Board majority easily rejected this argument by pointing out that any union activity short of picketing that previously had been regulated on this basis involved some signaling to unionized employees not to work, rather than appeals to consumers not to patronize. *Id.* In the cases treated in *Carpenters*, the banners were not directed at and did not cause any employees at the mall to not work. *See id.* For consideration of the argument that union consumer appeals should receive less First Amendment protection because they are a signal calling for a sympathetic response, *see infra* notes 139-41.

81. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 11. The Board majority asserted "the authority, indeed . . . a duty, to construe the Act, if possible, so as not to violate the Constitution." *Id.* at 11 n.35. The dissenters disagreed, misleadingly citing *Hudgens v. NLRB*, 424 U.S. 507 (1976), and inaccurately claiming that the Supreme Court had previously "castigated the Board for venturing into a First Amendment analysis." 355 N.L.R.B. No. 159, slip op. at 24 n.36 (Schaumber and Hayes, Members, dissenting). The authority of an administrative agency to consider the constitutionality of its enabling legislation and to apply the constitutional avoidance doctrine of statutory construction present interesting and unresolved questions beyond the scope of this article. In my view, the duty of all branches of government and members of the government to abide by the Constitution must at least include a duty to apply the avoidance doctrine.

82. *Id.* at 12-13. The Board cites numerous Supreme Court decisions confirming First Amendment protection for the symbolic communication conveyed by expressive conduct. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 347 (2003) (holding that "while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate,

compromised by the sparseness of the message conveyed on a banner or by the message's emotional rather than cognitive appeal.<sup>83</sup> In response to an argument of the two dissenting Board members that bannerling deserves no more constitutional protection than does traditional union picketing, the majority cited Supreme Court opinions to again distinguish picketing as presenting the potential for confrontation.<sup>84</sup>

Finally, the Board majority dismissed the dissenters' argument that an "incidental" constraint on First Amendment protected expression may be justified by a substantial governmental interest in "economic regulation."<sup>85</sup> The dissenters' argument was not well developed, but the precedents supporting the "incidental effects" doctrine, including the leading case of *United States v. O'Brien*,<sup>86</sup> stand for the proposition that the government may incidentally constrain expressive conduct if and only if the government's interest in doing so is both substantial and also not related to the suppression of expression.<sup>87</sup> Contrary to the view of the apparently confused dissenters, the "incidental constraints" doctrine does not suggest that incidental constraints are acceptable

the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form"); *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (holding that residential "signs are a form of expression protected" by the First Amendment); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (holding that a defendant's conviction for desecrating a flag contrary to Texas law is not consistent with the First Amendment); *Cohen v. California*, 403 U.S. 15, 16 26 (1971) (protecting "the simple public display of [a] single four-letter expletive" on the back of a jacket reading "Fuck the draft"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (protecting under the First Amendment the rights of public school students to wear black armbands to protest war). Here, as elsewhere in the decision, the Board majority relied in part on analysis in *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005). *See United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at *passim* (N.L.R.B. Aug. 27, 2010).

83. *Id.* at 13; *see also* cases cited *supra* note 82.

84. 355 N.L.R.B. No. 159, slip op. at 13. The Board's support for the proposition that peaceful picketing, unlike peaceful handbilling or peaceful bannerling, does not deserve full First Amendment protection was less compelling, however, than its support for the protection of symbolic expressive conduct. The Board quoted ambiguous language from two opinions that referred to the physical nature of picketing. *See id.* (citing *Hughes v. Superior Court*, 339 U.S. 460, 464-465 (1950); *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 326 (1968)); *see also infra* notes 138-45 and accompanying text (discussing my view on how peaceful picketing should be treated under the First Amendment).

85. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 13-14.

86. *United States v. O'Brien*, 391 U.S. 367 (1968). The Court in *O'Brien* upheld a conviction for draft card burning based on a finding of a substantial government interest in the preservation of draft cards that was unrelated to the suppression of the expression conveyed by the burning of a card. *Id.* at 377.

87. *Id.* ("[A] government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

if the government asserts some interest in the suppression of the expression itself.<sup>88</sup>

While the majority's response could have been more precisely stated,<sup>89</sup> the dissenters' argument was properly dismissed because Congress had not and could not state any interest in suppressing non-confrontational consumer appeals of unions not related to the content of the appeals. An interest in avoiding the coercion of consumers is not related to the content of expression and thus might justify the prohibition of confrontational picketing, but it does not justify the prohibition of peaceful bannering or distinguish such expressive conduct from handbilling.

## II. THE FIRST AMENDMENT CAN PROVIDE DEFINABLE LIMITS ON THE PERMISSIBLE REGULATION OF CONSUMER APPEALS.

### A. The First Amendment Allows Regulation of Expression Intended to Incite Unlawful Boycotts.

Recognition that the First Amendment, rather than § 8(b)(4)(ii)(B), provides the strongest support for the Board's *Carpenters* decision as well as the Court's *DeBartolo II* decision raises two important and interrelated questions. First, how secure from economic regulatory policies should be the right of unions to make peaceful, non-confrontational appeals to consumers to not patronize businesses with the goal of forcing those businesses to take a stand against the labor policies of another business? And, second, what might be the limits on a coherent constitutionally based right to make such appeals?

Analysis of these questions might begin with several premises drawn from First Amendment doctrine. First, as recognized by the Board's majority opinion

88. The dissenters proposed that incidental effects on "First Amendment freedoms may be justified in certain narrowly defined instances," and also noted the Court had recognized "the strong governmental interest in certain forms of economic regulation," including "the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 25 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982)). The *Claiborne* Court's quotation from Justice Blackmun's concurring opinion in the *Safeco* case was at least ambiguous, however, given the *Safeco* Court's and Justice Blackmun's apparent assumption that picketing may warrant regulation because of its potentially coercive form rather than because of its message. In any event, the *Claiborne* Court in fact held that Mississippi had violated the First Amendment by prohibiting peaceful picketing to enforce a consumer boycott of white merchants to coerce them to support the boycotters' demands for racial desegregation to county officials. 458 U.S. at 913, 915. And, as I argued in my article on the implications of *Claiborne*, any distinction between peaceful picketing by labor unions and picketing by civil rights or other political groups is inconsistent with fundamental First Amendment principles demanding government neutrality between speakers and their social messages. See Harper, *supra* note 15, at 438-42; see also *infra* notes 112-27 and accompanying text.

89. See *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 15 (N.L.R.B. Aug. 27, 2010).

in *Carpenters*,<sup>90</sup> any such consumer appeal in whatever form, no matter how brief or symbolic, constitutes expression subject to at least some protection under the First Amendment. Second, as the Court in *DeBartolo II* seemed to recognize,<sup>91</sup> an appeal to not patronize because of the labor policies of some employer is speech about a socio-economic issue at the core of First Amendment protection, rather than commercial speech about the merits or demerits of a product subject to reduced protection.<sup>92</sup>

Third, even conduct that expresses a message at the core of the First Amendment nonetheless may be regulated under two potentially relevant doctrines. One of those doctrines, explained above in the discussion of *United States v. O'Brien*, allows expressive conduct to be regulated incidentally for a substantial reason because of the conduct rather than because of the content of the expression.<sup>93</sup> For instance, confrontational picketing may be regulated because the conduct is coercive or obstructive, rather than because of the content of the appeal to consumers.<sup>94</sup> The Board in *Carpenters* stressed the limit of this doctrine.

The second doctrine, however, allows regulation of the expression itself because that expression is part of or is intended to incite a criminal or, at least, an unlawful undertaking.<sup>95</sup> Might this doctrine be invoked to limit or even eliminate a union's right to make peaceful, non-confrontational appeals to consumers to join a boycott? The answer may be "yes," but only if the boycott itself can be and has been made unlawful. The *DeBartolo II* Court's refusal to interpret § 8(b)(4)(ii)(B) to cover organized, but uncoerced, consumer pressure on a business means that the NLRA does not make a consumer "secondary" boycott unlawful.

Assume, however, that the Court reinterprets, or Congress reformulates, § 8(b)(4)(ii)(B) to mean that it is illegal for a union to incite or organize a consumer boycott of a business for the purpose of "forcing or requiring [that business] to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."<sup>96</sup> Although this reformulation would only make illegal a labor union's organization of, and not consumer

90. See *supra* note 82 and accompanying text.

91. See *supra* note 46 and accompanying text.

92. But cf. *infra* notes 159-60 and accompanying text (discussing consumer appeals based on criticisms of products rather than of labor policies).

93. See *supra* note 87 and accompanying text.

94. See *supra* notes 76-78 and accompanying text.

95. As recently as 2010, the Court has listed the "incitement" of illegal activity and "speech integral to criminal conduct" as categories of speech that may be regulated without raising "any constitutional problem." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Empire Storage & Ice Co.*, 336 U.S. at 498.

96. 29 U.S.C. § 158(b)(4)(ii)(B) (2006).

participation in, the boycott,<sup>97</sup> it would satisfy doctrine allowing regulation of speech that is part of an illegal course of conduct; Congress certainly can make the organization of particular activity illegal without making criminal all participation in the activity. Furthermore, such a reformulation presumably could cover any expressive conduct, including the distribution of handbills or the placement of pleas or directions in the press or the electronic media that was part of the organization of such a boycott.<sup>98</sup>

#### B. Consumer Boycotts Should Be Afforded Constitutional Protection.

Should our society find acceptable the kind of economic regulation described in the last paragraph? This was one of the questions I explored in my earlier article, where I urged the recognition of a constitutional right to engage in consumer boycotts founded on the Court's decision in *NAACP v. Claiborne Hardware Co.*<sup>99</sup> In *Claiborne Hardware*, the Court held that Mississippi could not prohibit a generally peaceful consumer boycott of stores designed to pressure the storeowners to support the boycotters' efforts to desegregate public schools and facilities and to achieve other civil rights goals.<sup>100</sup>

I argued that the Court's decision could best be justified by the positing of a general right to engage in consumer boycotts as political acts that enable individuals to have greater opportunities to affect the society, polity, and economy in which they live.<sup>101</sup> Because of the *O'Brien* doctrine and its allowance of governmental regulation of unprotected conduct that incidentally inhibits First Amendment expression associated with the conduct, the *Claiborne Hardware* decision could not be justified merely as the protection of boycotts as consumer expression (or autonomy or association) without some basis for protecting the conduct of which boycotts are a part.<sup>102</sup>

This basis, I explained, must be a right of consumers to harm businesses through the conduct urged by the boycott organizers' speech—i.e., the concerted refusal to purchase.<sup>103</sup> Without sacrificing a First Amendment principle of government neutrality toward the content of First Amendment-protected activity, such a right to boycott cannot be limited to boycotts

97. The NLRA, in § 8(b), makes unlawful certain conduct by a "labor organization or its agents." 29 U.S.C. § 158(b) (2006). It does not prohibit conduct by consumers. *See id.*

98. Congress might also constrict the statutory labor exemption from the antitrust laws first formulated by the Court in 1941. *See United States v. Hutcheson*, 312 U.S. 219, 232 (1941) ("So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."). Doing so could reinvigorate the Court's earlier holding, finding a union's consumer boycott of hats manufactured by non-union labor to be a violation of the antitrust laws. *See Loewe v. Lawlor*, 235 U.S. 522, 534-36 (1915).

99. *See Harper, supra* note 15.

100. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).

101. *See Harper, supra* note 15, at 420-26.

102. *Id.* at 413-17.

103. *Id.* at 424-25.

organized by those seeking racial justice or even those seeking ultimate redress from government rather than from private institutions of social or economic power.<sup>104</sup>

I remain convinced that these contentions, advanced almost three decades ago and four years before the Court's decision in *DeBartolo II*, are correct.<sup>105</sup> The Court's hesitance in *DeBartolo II* to declare a labor union-organized, peaceful "secondary" consumer boycott<sup>106</sup> illegal under § 8(b)(4)(ii)(B), like the Court's refusal in *Claiborne Hardware* to allow Mississippi to declare a civil rights-based, peaceful secondary boycott illegal, is best supported by a right of consumers to join together to use their purchasing power to pressure businesses to help them affect the society, economy, or policy in which the consumers live. Moreover, more recent Supreme Court decisions confirm that the recognition of any right to engage in a consumer boycott should not turn on judicial approval or acceptance of the goals or targets of the boycott.<sup>107</sup>

A right to organize or join in a consumer boycott cannot be derived solely from any individual right to express one's identity or affiliations through choices of vendors or service providers. This individual right is part of the basis for a political right to pressure businesses for social change but is not a sufficient independent basis for protecting the concerted exercise of the right from regulation designed to shield businesses from such pressure. As the antitrust laws demonstrate, the First Amendment right of association does not necessarily extend to a right to take concerted or even parallel action to create economic effects.

The protection of a right to engage in concerted or even consciously parallel decisions on the patronization of businesses for political, social, or economic ends must instead be based on the desirability of our polity extending rights to citizens to act together as consumers for these ends.<sup>108</sup> The argument

104. *Id.* at 437-39.

105. This position was not then and is not now based on any particular theory for interpreting what our constitution means, but rather on what our foundational law should protect. *See id.* at 420. My argument concerns what our constitutional law should be, rather than how the Court should interpret what it is.

106. A more descriptive name for such boycotts might be "surrogate," *see* MONROE FRIEDMAN, *CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA* 14 (Routledge 1999), but this title has not entered the common parlance.

107. *See infra* notes 115-23 and accompanying text.

108. As I stated in my earlier article, "[c]lashing the right to engage in concerted refusals to patronize as a right to attempt to affect social decisions . . . and making it analogous to the right to participate in political campaigns or to litigate for social change, shows why such a right should protect persons as fully when they act in association with others as it does when they act alone." Harper, *supra* note 15, at 423-24. Professors Alexander and Schwarzschild seem confused about this point, as well as others, in their unnecessarily acerbic commentary on my earlier article. *See* Maimon Schwarzschild & Lawrence A. Alexander, Essay, *Consumer Boycotts and Freedom of Association: A Comment on a Recently Proposed Theory*, 22 SAN DIEGO L. REV. 555 (1985). They assert that my project in the article was "to establish an individual's right to refuse to deal," *id.* at 561, and criticize my willingness to allow prohibitions on consumer boycotts based on the ethnicity or other status characteristics of business owners because it is "absurd" to suggest

for such an extension of our democracy into the economic sphere has an egalitarian, as well as a libertarian, basis. Protection of a right to engage in concerted consumer action grants common citizens another means to influence the society in which they live,<sup>109</sup> providing at least a small balance against large concentrations of public and private power. Although some consumers have more purchasing power than others, the inequalities are surely much less than those in an electoral political system that is controlled by the campaign contributions of wealthy citizens.<sup>110</sup> More importantly, the aggregation or "bundling" of the economic votes of a sufficient number of average consumers can easily eclipse the votes of the wealthy, who may not even patronize some targeted businesses.<sup>111</sup>

The First Amendment right to engage in concerted consumer action recognized by the Court in *Claiborne Hardware* cannot be limited based on the laudable civil rights goals of the boycott organizers in that case<sup>112</sup> without violating general principles requiring judicial neutrality toward First

that individual consumers cannot make purchasing decisions based on immutable characteristics, such as the beauty of a movie star, *id.* at 560. I thought it was clear that my article, like the *Claiborne Hardware* decision on which it was based, was primarily about why our society might wish to protect concerted consumer boycotts, not about defending the autonomy of individual consumer choice. Ironically, a focus on the autonomy of consumer choice as a necessary, if not sufficient basis, for a consumer right to boycott, should have enabled Alexander and Schwarzschild to understand why our society might wish to protect consumer decisions as political acts and still not protect an individual's "torching" a store or "shooting" the families of the storeowners. *See id.* at 557. I would have thought a distinction between the freedom of individuals to make purchasing decisions and the freedom to torch stores and shoot people would have been obvious.

109. Some recent studies indicate that consumer boycotts and the political consumerism of which they are a part have become an important part of civic participation in modern societies throughout the world. *See, e.g.,* Russell J. Dalton, *Citizenship Norms and the Expansion of Political Participation*, 56 POL. STUDS. 76, 91 (2008) (reporting that in 2005, 18 percent of Americans said they boycotted a product for political or social reasons in past year, and 22 percent said they bought a product for such reasons); Deirdre Shaw, Terry Newholm & Roger Dickinson, *Consumption as Voting: An Exploration of Consumer Empowerment*, 40 EUR. J. MKTG. 1049, 1051 (2006) (recounting in-depth interviews of consumers in Scotland who view themselves as voters "creating the societies of which they are a part by their purchases just as they may influence their environments by their votes in political elections"); Dietlind Stolle, Marc Hooghe & Michele Micheletti, *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 INT'L POL. SCI. REV. 245, 245 (2005) (discussing empirical study of consumers in Canada, Belgium, and Sweden).

110. *See* Harper, *supra* note 15, at 423.

111. *Id.* ("Because of the potential impact of marginal shifts in consumer spending, however, boycotts by even the economically poor and politically weak need not be ineffective.").

112. Indeed, lower courts have not so limited the First Amendment right to engage in concerted consumer action recognized by *Claiborne Hardware*. *See, e.g.,* Searle v. Johnson, 709 P.2d 328, 330 (Utah 1985) (protecting organization of tourist boycott of Uintah County because of inhumane treatment of dogs in local pound); *Envil. Planning & Info. Council of W. El Dorado Cnty., Inc. v. Superior Court*, 680 P.2d 1086, 1091 (Cal. 1984) (protecting organization of boycott of businesses advertising in anti-environmentalist newsletters).

Amendment-protected activity.<sup>113</sup> The current Court continues to affirm these principles, even when confronted with particularly offensive emotive speech. The Court in *Snyder v. Phelps*, for instance, held that a state could not impose tort liability on a family that peacefully picketed on public property near a military funeral with signs carrying vapid, non-sensible announcements such as "Thank God for Dead Soldiers," "Fags Doom Nations," and "You're Going to Hell."<sup>114</sup> These messages, asserted Chief Justice Roberts for the Court, were not intended as a personal attack, but rather addressed matters of "public concern," such as "homosexuality in the military" and "the fate of our [n]ation."<sup>115</sup> The messages therefore deserved First Amendment protection, despite the fact that the messages were "certainly hurtful" and perhaps making only a "negligible" contribution "to public discourse."<sup>116</sup>

The Court stressed the same message of neutrality toward the content of First Amendment protected activity in *Sorrell v. IMS Health Inc.*<sup>117</sup> The *Sorrell* Court held that Vermont could not prohibit pharmacies from selling to pharmaceutical manufacturers information on the prescribing practices of individual doctors.<sup>118</sup> The Court emphasized that the prohibition burdened the drug manufacturers' speech on the basis of its "content," because Vermont allowed the release of the information for purposes other than marketing.<sup>119</sup> Vermont's law did not impose only an incidental burden on protected speech, but rather one based on the content and the identity of the speaker.<sup>120</sup> If concerted consumer action constitutes First Amendment-protected activity, as *Claiborne Hardware* seemed to hold, it deserves the same protection from content-based government regulation. A principled, neutral Court cannot credibly claim that labor disputes that garner public attention are of only private interest or that labor-organized boycotts can be more aggressively regulated because of their less laudable goals or the identity of their organizers.

Justice Stevens' opinion for the Court in *Claiborne* distinguished prior decisions upholding prohibitions of labor and business boycotts by stressing that the *Claiborne* boycott "grew out of a racial dispute" that "differentiates this case from a boycott organized for economic ends."<sup>121</sup> Moreover, the Court, in a

113. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("Our principal inquiry in determining content neutrality is whether the government has adopted a regulation . . . 'without reference to the content of the regulated speech.'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992) ("The government may not regulate . . . based on hostility—or favoritism—towards the underlying message expressed.").

114. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216-17, 1220 (2011).

115. *Id.* at 1217.

116. *Id.* at 1220.

117. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663-64 (2011).

118. *Id.* at 2668 ("[P]harmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing.").

119. *Id.* at 2663.

120. *Id.* at 2665.

121. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).



later opinion by Justice Stevens, *FTC v. Superior Court Trial Lawyers Association (SCTLA)*, distinguished the laudatory goals of the *Claiborne* boycotters in upholding a Federal Trade Commission (FTC) cease and desist order from a concerted refusal by criminal defense lawyers in the District of Columbia to accept new cases to represent indigent defendants as a protest against the failure of the District to increase the fees for such work.<sup>122</sup> The "undenied objective" of the criminal defense lawyers subject to the FTC, stressed Justice Stevens, was "an economic advantage for those who agreed to participate," while "[t]hose who joined the *Claiborne Hardware* boycott sought no special advantage for themselves. No matter how altruistic the motives of [the attorneys] may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services."<sup>123</sup>

Yet, Justice Stevens' distinction was not convincing. The *Claiborne Hardware* boycotters also stood to gain economic benefits from the elimination of the racial segregation and discrimination they were pressing the boycotted merchants to oppose. More importantly, the Court has never suggested that any other First Amendment protections, even in the context of labor relations, are dependent on judicial approval of the lofty rather than self-interested goals of those claiming protection.<sup>124</sup> The Court has made clear that a state denies equal protection by favoring labor picketing over picketing that conveys other messages.<sup>125</sup> The Court cannot accept Congress' or a state's disfavoring of labor union appeals to consumers without expressing a bias against the content of the union appeal. Such a bias would only be highlighted, rather than hidden, by the Court announcing that the treatment of workers is not a public issue for public debate and attention.

It is possible, however, without violating the First Amendment neutrality principle, to distinguish the *Claiborne Hardware* boycott from not only the *SCTLA* boycott, but also most of the other labor and business boycotts that the Court has allowed to be regulated. This preferable distinction would be based not on the goals of the boycott organizers, but rather on the economic roles of the boycotters. In *SCTLA*, the boycotters were professionals operating legal businesses. In other cases upholding regulation under the antitrust laws against concerted boycotts, the boycotters were also businesses or independent contractors refusing to deal with other businesses.<sup>126</sup> In cases upholding the

122. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

123. *Id.* at 426-27.

124. The Court in *Sorrell v. IMS Health Inc.*, for instance, found irrelevant the fact that "the burdened speech [of the drug manufacturers] results from an economic motive" because a "great deal of vital expression" results from such self-interested motives. 131 S. Ct. 2653, 2665 (2011).

125. See, e.g., *Carey v. Brown*, 447 U.S. 455, 462 (1980) (holding that the state cannot define "permissible picketing in terms of its subject matter") (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)).

126. See, e.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465-66 (1986) (upholding antitrust regulation against Indiana dentists that agreed to refuse insurance company requests for submission of x-rays with reimbursement requests); *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 810 (1945) (upholding antitrust regulation

regulation of strikes, including picketing-induced "secondary boycott" strikes, the boycotters were workers jointly refusing to work.<sup>127</sup> In *Claiborne Hardware*, by contrast, the boycotters were consumers refusing to patronize certain merchants.

As I argued in my earlier article, the protection of consumer boycotts does not require the equivalent protection of "producer" boycotts—i.e., boycotts by the providers of labor or capital.<sup>128</sup> The distinction is not based on consumers being less likely to join in boycotts for selfless rather than selfish economic reasons, but rather on the fact that consumption is a much more democratic exercise of social choice. In contrast to consumers,

individuals as producers and owners of capital have specialized and very unequal market power. By threatening to withhold services or capital, some individuals can exert disproportionate leverage over important social decisions. Consumers, who are not in special economic roles, cannot effectively counter these threats even though their feelings may be equally intense.<sup>129</sup>

against local union who made closed-shop agreements with all local electrical equipment manufacturers and contractors).

127. See, e.g., *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 224 (1982) (applying § 8(b)(4) against longshoremen refusing to handle cargo destined to or arriving from Soviet Union); *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 293-95 (1957) (affirming a judgment against a union that picketed to induce truck drivers not to haul goods); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 497 (1949) (affirming a judgment against a union that picketed to induce truck drivers not to deliver or pick up ice from wholesalers).

128. See Harper, *supra* note 15, at 426-30.

129. *Id.* at 426-27. This distinction between consumer and producer boycotts does not of course mandate the prohibition of all producer boycotts. A strong case indeed can be made for expanding democracy through providing some limited constitutional protection of some concerted boycotts, or strikes, by employee producers. See, e.g., *Cnty. Sanitation Dist. No. 2 v. Los Angeles Employees Ass'n, Local 660*, 699 P.2d 835, 860-61 (Cal. 1985) (Bird, C.J., concurring) (contending that *Claiborne Hardware* supports a constitutional right to strike). Nevertheless, the case for protection of consumer boycotts is easier than that for the protection of producer boycotts: limited groups of consumers do not have the same special leverage over particular areas of commerce as do those who have such leverage because of specialized production or distribution roles. It is thus easy to reconcile the Court's acceptance of the illegality of the longshoremen's refusal to handle Soviet cargo with the Court's *Claiborne Hardware* decision in the same term. See Harper, *supra* note 15, at 427. In delicately labeling the distinction between consumer and producer boycotts "simplistic," Professors Alexander and Schwarzschild ignore the distinction between the specialized roles of employees and the unspecialized roles of consumers. See Schwarzschild & Alexander, *supra* note 108, at 558. The Congress that framed the Landrum-Griffin amendments to the NLRA, including those codified in § 8(b)(4)(ii)(B), however, certainly understood the special leverage of workers like Teamsters who could control the flow of commerce. As noted by the Court in both *DeBartolo I* and *NLRB v. Servette, Inc.*, "a principal source of congressional concern [in 1959] had been the secondary boycott activities of the Teamsters Union." *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 154 (1983); see also *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964).

Recognizing this distinction preserves from constitutional challenge the prohibition in § 8(b)(4)(i)(B)<sup>130</sup> of union involvement in strikes or other worker actions to force an employer to cease dealing with another employer—actions traditionally termed “secondary boycotts.”<sup>131</sup> Recognizing this distinction also preserves § 8(e) of the NLRA, which prohibits agreements between a union and an employer that the employer will not do business with another employer.<sup>132</sup> Such proscribed “hot cargo” agreements<sup>133</sup> both derive from a union’s threat to use the special economic leverage of workers and also combine this special leverage with the special economic leverage of an employer.

The distinction, however, also clarifies that union appeals to consumers, as much as the appeals to consumers of a civil rights group or of any other association favored by the judiciary, should be protected from governmental restraint. This is most obviously true for an appeal, like that in *Tree Fruits*,<sup>134</sup> for consumers not to purchase a particular product at stores of one business because the product is produced or distributed by another employer to whose labor policies the union objects. In such a case, the union organizers of the consumer boycott are not asking the retailing business to join in the boycott,

130. 29 U.S.C. § 158(b)(4)(i)(B) (2006). This section provides, in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object therefore is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

*Id.* The Board has held that this provision does not prohibit peaceful bannerings that would be otherwise protected by its decision in *Carpenters* merely because the bannerings occur at secondary work sites not frequented by consumers, unless there is evidence that any secondary employees do not work because of the bannerings or that the bannerings were intended to induce such employees not to work or was reasonably understood as such an inducement. See *Sw. Reg'l Council of Carpenters v. New Star Gen. Contractors, Inc.*, 356 N.L.R.B. No. 88, slip op. at 2 (Feb. 3, 2011).

131. Section 8(b) does not use the term “secondary boycott,” but § 8(b)(4) does prohibit what have been traditionally defined as “secondary” strikes or boycotts. See 29 U.S.C. § 158(b)(4) (2006); see, e.g., FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 43 (1930); Robert C. Barnard & Robert W. Graham, *Labor and the Secondary Boycott*, 15 WASH. L. REV. 137, 137 (1940); Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1363-64 (1962).

132. 29 U.S.C. § 158(e) (2006). This section provides, in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . . .

*Id.*

133. See *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 634 (1967).

134. See *supra* notes 34-37 and accompanying text.

but are simply presenting the retailer with a change in consumer demand for a particular product.

Any union appeal to consumers to not patronize, however, is an effort to change the demand for a product or products sold by a business whose social decisions the union questions, even if those social decisions concern the willingness to deal with other businesses with anti-union labor policies. A consumer boycott because of merchants’ support of particular social policies, as occurred in *Claiborne Hardware*,<sup>135</sup> is as much an effort to use the economic votes of consumers to change the socio-economic decisions of influential entities as is a consumer boycott of merchants because of those merchants’ own labor policies. What might be termed a “secondary consumer boycott” is thus primarily another expression of politically knowledgeable consumer demand. As long as it does not insist on a joint commitment from a business, it should be treated as an inducement of a concerted producer boycott.<sup>136</sup>

Thus a consumer appeal should be protected from governmental restraint even in a case—like the consolidated cases treated by the Board in *Carpenters* or by the Court in *DeBartolo II*—where the labor policies to which the union objects are those of a business other than the business that the union has appealed to consumers to target. The hospitals and restaurant bannered in *Carpenters* and the shopping mall and its tenants leafleted in *DeBartolo* were not truly neutrals with no responsibility for the below-scale wages paid by the construction contractors the union was trying to reform. In each case, the businesses that would be affected by an effective consumer appeal had made a social and an economic choice to have a relationship with a construction contractor that paid below-scale wages. That choice, like the choice of consumers to purchase the merchants’ products, at least arguably affected the wages earned by construction workers in the region. The idea of neutrality in economic or social relationships is a transparent illusion.<sup>137</sup>

135. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 888-89 (1982).

136. I concluded in my earlier article, that while Congress “should not restrict ordinary consumers from using their limited buying power to try to affect the employment relations of society unless businesses are also restricted from using their special economic power,” Congress could proscribe “labor-related business boycotts of other businesses,” as Congress has proscribed union-employer boycott agreements in § 8(e). Harper, *supra* note 15, at 444, 444 n.168. I then attempted to insulate a broad range of labor union-organized boycotts by expanding, beyond the Court’s decision in *Safeco*, the reach of the *Tree Fruits* distinction of boycotts that target particular products. See *id.* at 445-48. I now think my acceptance of restraints on some secondary consumer boycotts was wrong. Absent an agreement with other businesses or with a labor union representing workers, an employer’s decision not to deal with another employer does not constitute a concerted producer boycott. It is only a decision by one business not to deal with another business because of the effects of such dealing on its patronage. Making illegal a sole business’s refusal to deal with another business because of the effects of a consumer boycott, or of particular kinds of consumer boycotts—such as those organized by labor unions—would be inconsistent with the existence of a right of consumers to engage in boycotts.

137. Unions, like other boycott organizers, of course choose their targets based on the targets’ accessibility to consumer choice. See Monroe Friedman, *Consumer Boycotts in the United States, 1970-1980: Contemporary Events in a Historical Perspective*, 19 J.



C. *The First Amendment Does Not Protect Coercive or Confrontational Consumer Appeals.*

Clarifying that the Board's and the Court's protection of union appeals to consumers ultimately is dependent on the existence of the right of consumers to act in concert to influence social decision-making raises a related question: what limits might be placed constitutionally on the form of consumer appeals? As suggested above, and as understood by the Board majority in *Carpenters*, read together with the Court's decisions in *Safeco* and *DeBartolo II*, a constitutionally protected consumer appeal must not be coercive or confrontational.<sup>138</sup> However, as I argued in my earlier article,<sup>139</sup> and as the Court in many cases both prior to and after *Safeco* has recognized,<sup>140</sup> not all patrolling with picket signs is coercive or confrontational and thus undeserving of First Amendment protection. The *Safeco* Court too quickly dismissed the First Amendment issue raised by the prohibition of peaceful picketing intended not to induce a work stoppage, but rather only to persuade customers not to patronize a business that deals with an employer with challenged labor policies.<sup>141</sup>

CONSUMER AFFS. 96, 102-04 (1985) (arguing that boycotters generally target accessible businesses even if surrogates). As the *Carpenters* and *DeBartolo* cases illustrate, accessible targets are businesses like restaurants or hospitals or merchandise outlets that deal directly with consumers, rather than construction companies or industrial service companies that do not.

138. See *supra* notes 75-77 and accompanying text. Of course, to be protected from state interference, the appeals must take place on public property rather than on the private property of a targeted business. See *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (finding no First Amendment violation in a shopping mall's invocation of state trespass law). But cf., e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (confirming state constitution can restrict property rights to confer broader rights of expression); *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 754 (Cal. 2007) (protecting boycott because shopping mall is a public forum under state constitution).

139. See Harper, *supra* note 15, at 438-42.

140. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (protecting picketing on public streets while allowing state to prohibit picketing residences); *Boos v. Barry*, 485 U.S. 312, 321, 331 (1988) (protecting carrying signs on public sidewalks in front of embassies); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-15 (1982); *Carey v. Brown*, 447 U.S. 455, 459-63 (1980) (arguing that the state cannot protect some peaceful picketing under the First Amendment based on the picketing's message); *Police Dep't v. Mosley*, 408 U.S. 92, 94 (1972) (arguing that the state cannot protect some peaceful picketing under the First Amendment based on the message of the picketing); *Am. Fed'n of Labor v. Swing*, 312 U.S. 321, 325-26 (1941) (holding that the state cannot prohibit peaceful picketing because it does not concern a dispute between an employer and those directly employed by "him"); *Thornhill v. Alabama*, 310 U.S. 88, 102-06 (1940) (finding a constitutional right to picketing not lost because a labor dispute is involved).

141. Justice Stevens in a concurring opinion in *Safeco* made an attempt to distinguish picketing "[i]n the labor context" by claiming that such picketing calls for "an automatic response to a signal, rather than a reasoned response to an idea." *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring). As I pointed out in my previous article, however, the brief messages on most picket signs, including those used by the Claiborne picketers, generally do not persuade by invoking a reasoned response. See Harper, *supra* note 15, at 440-42. The distinction of labor picketing

Nevertheless, adopting a bright-line rule distinguishing between traditional labor picketing near the entrance to a facility and other forms of consumer appeals is arguably justifiable. Traditional labor picketing, unlike other types of union appeals to consumers, may pose a special risk of inducing some employees not to work, even if the picketing does not occur close to employee entrances to the picketed facility. Moreover, as long as protection is afforded to other forms of communication around a facility, it generally is not necessary to appeal to consumers through picket signs carried by patrolling agents.<sup>142</sup> If patrolling picketers are a more effective means of communicating to contemporary consumers than are leaflets or stationary banners or other displays, it may be because some consumers fear a psychological if not a physical confrontation when passing by the patrols.

Any such bright-line rule allowing the restriction of traditional labor picketing, even when it appeals in a peaceful manner to consumers, however, should be limited. It certainly should not be expanded to allow prohibition of a union's use of large but non-obstructive and stationary symbolic displays like the inflatable rats recently utilized by unions.<sup>143</sup> Nor should it allow prohibition of mobile dramatizations staged away from access paths to a facility, but in view of potential patrons.<sup>144</sup> The fact that some union agents are sufficiently close to a targeted facility to identify those individuals who enter the facility certainly should not justify prohibition of the agents' presence without any demonstration that the union agents have threatened or committed any retaliatory actions.<sup>145</sup> The *Safeco* decision should be interpreted narrowly to

as a signal to workers is based on picketing being used to induce strikes, i.e., worker boycotts, not to induce consumer refusals to patronize. *Id.* (discussing intellectual history of idea of signal picketing).

142. I argued in my earlier article for the protection of peaceful picketing for consumer boycotts in part based on an assumption that a prohibition of such picketing would also include the prohibition of other alternative modes of communication around targeted businesses. See *id.* at 434, 434 n.115. If boycott organizers are able to leaflet and banner, and are not relegated to the use of more expensive and dispersed forms of communication, such as the electronic and print media, the balancing of the risks and benefits of peaceful picketing can be changed.

143. See, e.g., *Gold v. Mid-Atl. Reg'l Council of Carpenters*, 407 F. Supp. 2d 719, 728 (D. Md. 2005) (finding display of stationary inflatable rat, like display of banners, not coercive of consumers and thus not a violation of § 8(b)(4)(ii)(B)).

144. See, e.g., *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 438-39 (D.C. Cir. 2007) (finding that "mock funeral" procession one hundred feet from hospital did not violate § 8(b)(4)(ii)(B) because participants did not "physically or verbally interfere with or confront Hospital patrons" or create any kind of barrier to their use of hospital). But see *Kentov v. Sheet Metal Workers' Int'l Ass'n, Local 15*, 418 F.3d 1259, 1265-66 (11th Cir. 2005) (granting NLRB's request for an injunction of same funeral procession, based in part on "deferential review" of Board). On remand of the Sheet Metal Workers case, the Board, relying on its *Carpenters* decision, held that the non-obstructive use of both the inflatable rat and the mock funeral procession were not prohibited by § 8(b)(4)(ii)(B). See *Sheet Metal Workers Int'l Ass'n, Local 15 v. Galencare, Inc.*, 356 N.L.R.B. No. 162, slip op. 3, 5 (May 26, 2011).

145. Similarly, any claim that union appeals should be subject to regulatory control because the appeals are likely to provoke violence should turn on whether the union agents

allow only restraints on consumer appeals by picketers who patrol sufficiently near an entrance to a facility to present a meaningful risk of either psychological confrontations with potential consumers or refusals to work by some employees.<sup>146</sup>

*D. Misleading Consumer Appeals Should Be Regulated Only Under First Amendment-Based Defamation Law.*

Some businesses may claim that messages communicated in consumer appeals are misleading, regardless of whether the appeals are posted on picket signs or on banners or written on handbills. Indeed, the dissenting opinion in the *Carpenters* case argued that the use of the phrase "labor dispute" on the banners utilized in the three consolidated cases misled the public into thinking the dispute involved wages or working conditions at the targeted businesses rather than with the targeted businesses' involvement with other employers, even though the union agents made available explanatory leaflets.<sup>147</sup>

Labor law, however, should not be brought to bear against a union message because of the misleading content of the message; labor law should be

actually directed "fighting words" at potential patrons of targeted facilities. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). But cf., e.g., *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (noting that "generalized expression of dissatisfaction with the policies of the Federal Government" through flag burning cannot be reasonably regarded "as a direct personal insult or an invitation to exchange fisticuffs"); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973); *Cohen v. California*, 403 U.S. 15, 20 (1971).

146. As pointed out by Chief Judge Ginsburg in *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007), the Supreme Court's decisions concerning protests at abortion clinics "provide specific guidance" that could apply to labor picketing to avoid "unconstitutional viewpoint discrimination." *Id.* at 436. In *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), the Supreme Court upheld a state court injunction creating a thirty-six-foot buffer zone around the clinic's entrances and driveways, but invalidated one creating a three-hundred-foot buffer zone around the abortion clinic that protesters were prohibited from entering. *Id.* at 770, 773, 776. In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court upheld as constitutional a state statute making it unlawful to make an unwanted physical approach to within eight feet of another person for the purpose of passing out a leaflet, handbilling, displaying signs, or engaging in oral protest, within one hundred feet of the entrance to an abortion clinic. *Id.* at 707 n.1, 714. However, the buffer zones acceptable to insulate potential patrons of abortion clinics from protesters should not necessarily be acceptable for the regulation of peaceful labor banner. In *Local Union No. 1827, United Bhd. of Carpenters & Joiners of Am. v. United Parcel Serv., Inc.*, 357 N.L.R.B. No. 44 (N.L.R.B. Aug. 11, 2011), for instance, the Board found not prohibited by § 8(b)(4)(ii)(B) banner between seven and twenty-five feet from a driving entrance to one targeted facility, next to entrances to a parking garage and lot, and only eight feet from an outdoor dining area of a restaurant. *Id.* at 4 n.11, 5. *Madsen* and *Hill* were cited by the dissent, *id.* at 8 n.8 (Hayes, Member, dissenting), but the majority stressed that in these cases protesters yelled "killing your baby" and "thrust signs showing pictures of bloody fetuses in the faces of patients," while the banner by Local Union No. 1827 was peaceful and "accompanied by a few handbills," merely "requesting that the public not eat at a particular restaurant." *Id.* at 5 n.12. The Board stressed the administrative law judge's "finding that none of the [union's] agents blocked ingress or egress at any site." *Id.* at 5.

147. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159, slip op. at 2 (N.L.R.B. Aug. 27, 2010).

concerned only with the possible coercive nature of the message or of accompanying conduct or because the message encourages illegal activity such as secondary strikes. Section 8(c) of the NLRA indeed makes this clear by providing that

[t]he expressing of any views . . . or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provision of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.<sup>148</sup>

A business might invoke a state's common law against a union's publication of a misleading message that is also defamatory, whether the message is conveyed in a banner, a placard, or a handbill. Even a defamation cause of action, however, should be dependent on the business demonstrating that the union's defamatory statements were published with knowledge of their falsity or with reckless disregard of their truth.<sup>149</sup> The Supreme Court has held that state law defamation actions against statements made in a labor dispute are preempted by federal labor laws unless the defamed party can demonstrate such knowledge of falsity or reckless disregard of truth.<sup>150</sup>

Union appeals to the public to not patronize a business because of its economic support or connection to a labor dispute should be protected by this preemption principle. The principle, of course, borrows from the Court's First Amendment-based limitation on defamation suits brought by public officials<sup>151</sup> or figures<sup>152</sup> or by private figures seeking presumed or punitive damages for speech on a matter of public concern.<sup>153</sup> A neutral application of the First Amendment that is not hostile to labor unions would protect as speech on a matter of public concern messages about socio-economic disputes sufficiently serious to cause a public reaction.<sup>154</sup>

148. 29 U.S.C. § 158(c) (2006); see also *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969) (explaining that section 158(c) "implements the First Amendment").

149. This definition of the malice a defamation plaintiff must establish to overcome a conditional privilege such as that afforded to appeals in labor disputes, see *infra* note 151, derives from the Court's protection of speech about public officials or figures, see *infra* notes 152-53, and was adopted in RESTATEMENT (SECOND) OF TORTS § 600 (1977).

150. See *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 285 (1974) (protecting from state libel law action union's use in monthly newsletter of definition of "scab" including the word "traitor" to refer to a list of particular non-union workers); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 65 (1966) (holding that federal law "permit[ted] recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false").

151. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

152. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162-65 (1967) (Warren, C.J., concurring).

153. See *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 347-50 (1974).

154. As I acknowledged in my earlier article, however, "[b]usiness boycott targets in most cases would not qualify as 'public figures' or individuals who had voluntarily thrust

Furthermore, for a defamation to be actionable at all, it must convey a false message.<sup>155</sup> Most consumer appeals, such as those on the banners in the cases consolidated by the Board in its *Carpenters* decision, do not do so. The word "shame" expresses only an opinion, which cannot be false or true.<sup>156</sup> The phrase "labor dispute" simply conveys the message that the union has a dispute with the targeted business involving a labor issue. Concluding that it is false to state that a targeted business is in a labor dispute because of an economic relationship with another business requires the application of a non-neutral definition of what constitutes involvement in a labor controversy. As stated by Judge Berzon in her excellent opinion considering the constitutional status of banner in *Overstreet v. United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506*:

[E]ven to labor law aficionados, the term "labor dispute," standing alone, is not limited to primary disputes.

.... Disputes, labor and otherwise, commonly spill over to affect secondary institutions, as individuals with strong opinions concerning the dispute seek to convince those with some prospect of influencing the outcome of the dispute to do so.<sup>157</sup>

themselves into a public controversy" for purposes of the Court's First Amendment-based constraints on defamation law. Harper, *supra* note 15, at 432 n.109; see also Wolston v. Reader's Digest Ass'n Inc. 433 U.S. 157 (1979); Hutchinson v. Proxmire, 433 U.S. 111 (1979).

155. See RESTATEMENT (SECOND) OF TORTS § 581A (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.").

156. A "statement in the form of an opinion" may be "actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT (SECOND) OF TORTS § 566 (1977). No particular facts subject to verification or falsification are implied by a general opinion such as "shame."

157. *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1216 (9th Cir. 2005). Judge Berzon gave examples of how it is typical for consumer activists to view secondary employers as involved in labor disputes: "[c]lothing manufacturers allegedly operate sweatshops, and activists protest institutions that buy clothing from those manufacturers . . . . A nation takes controversial political or military actions, and activists pressure universities and other institutions to divest endowment or other funds from businesses supporting those actions." *Id.* She might have also mentioned Claiborne County officials enforcing segregation laws, and civil rights activists pressuring influential merchants to withdraw their support of the officials. For a particularly insightful study of the potential and limitations of international boycott campaigns, see GAY W. SEIDMAN, *BEYOND THE BOYCOTT* (2007). In some cases unions have intentionally conveyed false messages in appeals to consumers. Judge Berzon, for instance, cited her court's affirmation of an injunction against signs outside of a hospital stating that "THIS MEDICAL FACILITY IS FULL OF RATS." *Overstreet*, 409 F.3d at 1217 (citing San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1236 (9th Cir. 1997)). The Ninth Circuit panel in *San Antonio* argued the general public would read this phrase to refer to a rodent problem at the hospital. *San Antonio Cmty. Hosp.*, 125 F.3d at 1236. Furthermore, unions making consumer appeals, like any other publishers of defamatory messages, should not be able to claim that a statement does not convey a false message

A union may, of course, omit any reference to any labor dispute in its appeals to consumers not to patronize a business. For example, a union may base its consumer appeal on criticism of a business's product<sup>158</sup> while advising the business's owners that it will cease if the owners agree not to deal with another business. Some might argue that such an appeal should be viewed as negative advertising and thus subject to the same kind of regulation of false and deceptive claims as any commercial speech.<sup>159</sup> Regardless of the merits of such an argument,<sup>160</sup> however, a union's connection of its criticism of an employer's product to the employer's labor policies,<sup>161</sup> should qualify its appeal as speech on a socio-economic issue that cannot be prohibited because it is misleading.<sup>162</sup>

#### CONCLUSION

Those seeking paths to an expansion of American democracy should celebrate the Board's *Carpenters* decision.<sup>163</sup> The Board's decision stands on

simply because it may be literally true. For instance, a banner held before a hospital that states "ten patients died here last week" may be literally true, but also may convey a false message of extraordinary deaths due to medical negligence.

158. For instance, the mock funeral procession staged near a hospital in *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007), was accompanied by the distribution of leaflets detailing several malpractice suits against the hospital. *Id.* at 432.

159. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498-99, 500 n.9 (1996); *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 475 (1989); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, 771 n.24 (1976). Consumer criticisms of products, however, do not have the durability provided by the profit motive that justifies in part greater regulation of commercial advertising or even invidious comparative advertising by competitors. See 425 U.S. 748 at 771-72 n.24. The Lanham Trademark Act prohibits a "false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1)(B) (2006). This prohibition covers a commercial business's negative misrepresentations concerning a competitor's products or commercial activities. See, e.g., *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1308-09 (11th Cir. 2010); *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273-74 (10th Cir. 2000); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 278-79 (2d Cir. 1981). This prohibition has been protected from First Amendment challenge. See, e.g., *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 948 (3d Cir. 1993). The prohibition, however, does not cover negative misrepresentations made by non-competitors for purposes other than advertising. Cf. *Osmose, Inc.*, 612 F.3d at 1323 (holding that injunction cannot cover First Amendment activity other than commercial advertising).

160. I could find no opinion in which criticism of a product by a non-competitor is treated as commercial speech worthy of only reduced First Amendment protection.

161. The court in *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, for instance, found an "implication" that the "alleged malpractice was linked to the Hospital's use of non-union labor." 491 F.3d at 432.

162. Although the Court has stated that advertisers cannot immunize false statements in advertisements from regulation by including references to public issues, criticism of the effects of a labor dispute on an employer's products does not constitute advertising. See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983).

163. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 v. Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159 (N.L.R.B. Aug. 27, 2010).

firm precedential ground. Though its interpretation of § 8(b)(4)(ii)(B) is no more persuasive than was the Court's interpretation of this provision in its *DeBartolo II* decision, the Board's decision fully embraces the clear directive of the Court's decision and is faithful to its First Amendment underpinnings.<sup>164</sup>

A First Amendment interpreted to expand American democracy and without bias against labor unions should protect non-coercive union appeals to consumers as it protects other speech on socio-economic issues of potential concern to the public. That protection should not be compromised because the appeals may harm businesses that have an economic relationship with other businesses whose labor policies are the ultimate concerns of the appeals. Because consumers should be granted the right to impose such harm as a political act, any appeal for them to do so should not be subject to governmental restraint. If the appeals convey intentionally or recklessly false factual messages, they may be subject to state defamation law. But they should not be subject to the restraint of federal labor law.

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164. See *supra* notes 75-88 and accompanying text.